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No. 93-1691

In The

Supreme Court of the United States

October Term, 1993

MONROE MANESS,

Petitioner,

v.

STAR-KIST FOODS, INC.; H.J. HEINZ COMPANY, INC.; MATKOV, GRIFFIN, PARSONS, SALZMAN & MADOFF; KEITH C. HULT; JAMES J. SALZMAN; RAY McCABE; ALAN D. DIERDORFF; and LARRY BURKE,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS STAR-KIST FOODS, INC.; H.J. HEINZ COMPANY, INC.; RAY McCABE; ALAN D. DIERDORFF; and LARRY BURKE

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12 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE DECISION OF THE COURT OF APPEALS DOES NOT DIMINISH THE RIGHT OF AN EMPLOYEE TO ENGAGE IN ACTIVITY PROTECTED UNDER TITLE VII FREE FROM RETALIATION 4

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER RETALIATORY ANIMUS OF AN OUTSIDE TRIAL ATTORNEY CAN BE IMPUTED TO THE ATTORNEY'S CLIENT ... 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer, 470 U.S. 564 (1984) 6

Benson v. Little Rock Hilton Inn, 742 F.2d 414 (8th Cir. 1984) 7

Davis v. Lambert of Arkansas, Inc., 781 F.2d 658 (8th Cir. 1986) 7

Jackson v. St. Joseph State Hospital, 840 F.2d 1387 (8th Cir. 1988), *cert. denied*, 488 U.S. 892 (1988) 7

Johnston v. Harris County Flood Control Dist., 869 F.2d 1565 (5th Cir. 1989) 7

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 6

St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993) 5

Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981) 7

STATUTES

Minn. Stat. § 363.03, subd. 7 (1985) 2

Title VII, 42 U.S.C. § 2000e-3(a) (1988) 2

MISCELLANEOUS

Fed. R. Civ. P. 52(a) 6

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Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

STATEMENT OF THE CASE

For approximately one year, petitioner, Monroe Maness, and his attorney ignored repeated verbal and written requests made by outside trial counsel for respondent Star-Kist Foods, Inc. ("Star-Kist") that petitioner participate in a meeting, at which petitioner's attorney would be welcome, to discuss concerns that petitioner had revealed privileged communications to a party adverse to Star-Kist in a Title VII suit (hereinafter the "Ellenberg case"). Petitioner was not a party in the Ellenberg case. Through discovery and pretrial rulings it had become apparent that privileged information had been revealed by petitioner, and Star-Kist's attorneys sought a meeting with petitioner to determine the extent to which privileged information had been divulged. Ultimately, after many attempts to arrange a meeting were ignored, Star-Kist terminated petitioner's employment. Petitioner commenced an action against Star-Kist and others, including its outside trial counsel, alleging, *inter alia*, retaliation in violation of Title VII, 42 U.S.C. § 2000e-3(a) (1988) and the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7 (1985). After a nine-day bench trial, the District Court entered judgment for all defendants on petitioner's retaliation claims. The District Court found: (1) that petitioner made a *prima facie* case of retaliatory discharge; (2) that Star-Kist established a legitimate and non-discriminatory reason for the discharge; and (3) that petitioner failed to establish pretext. The District Court also found that neither Star-Kist nor its employees participated in any reprisal or discrimination and found that outside trial counsel did not aid or abet any reprisal. Petitioner appealed the District Court's finding of a non-

retaliatory reason for his discharge and also the dismissal of a common law claim for tortious interference with contractual relations. The Court of Appeals for the Eighth Circuit affirmed and a Petition for Rehearing and Suggestion for Rehearing En Banc was denied.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied because each of the two issues petitioner has framed for review are predicated upon factual assertions that are contrary to the factual findings made by the District Court following a bench trial. Petitioner has, with respect to both issues he presents, substituted his own inferences and arguments about the facts for the District Court's findings. In that regard, petitioner's first issue assumes that his employment was terminated because of his protected activity, and petitioner's second issue assumes that Star-Kist's trial counsel in the Ellenberg case caused petitioner's termination out of retaliatory animus. However, the District Court unequivocally found that the termination of petitioner was independent of petitioner's involvement in any protected activity and was also nonretaliatory. The District Court further found that there was neither any retaliatory animus nor any attempt by the trial attorney to mislead Star-Kist with respect to the decision to terminate petitioner's employment. As petitioner has not, and indeed cannot, challenge the District Court's findings as clearly erroneous, the questions petitioner has framed for review are without foundation in the record.

In addition, with respect to the first issue presented for review by petitioner, petitioner has articulated an erroneous test with respect to proving causation in a retaliation case. In that regard, petitioner relies upon an attenuated "but for" test that would, if adopted, prevent trial courts from determining as a matter of fact, whether an adverse employment decision was independent of participation in protected activity. Petitioner's misstatement of the law with respect to the test for causation constitutes an additional basis for denying the Writ.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT DIMINISH THE RIGHT OF AN EMPLOYEE TO ENGAGE IN ACTIVITY PROTECTED UNDER TITLE VII FREE FROM RETALIATION.

Petitioner suggests as his first issue that the decision of the Court of Appeals weakens the right of an employee to engage in protected activity and consult with counsel.[1] However, the instant case fails to present the issue framed by petitioner for two reasons. First, the District Court found as a matter of fact, based upon evidence in the record, that the decision to terminate petitioner was independent of petitioner's protected activity and was

[1] While the facts pertaining to communications involving petitioner's counsel were fully developed at trial, the decisions of the District Court and Court of Appeals reveal that a separate "right to counsel" argument is being raised for the first time in this Court.

not retaliatory. Second, petitioner has advocated a facile test for proving causation in a retaliation case that does not comport with applicable law.

The pivotal fact issue at trial was whether petitioner was terminated because he refused to meet with and provide information to Star-Kist attorneys with respect to a concern that petitioner had revealed privileged communications or whether the termination was retaliation for petitioner's willingness to provide unfavorable testimony in the Ellenberg case. The District Court unequivocally found that Star-Kist did not retaliate or discriminate and that petitioner was terminated because he refused repeated requests to participate in a meeting on matters independent of protected activity. (A[2] 73.) This finding on the "ultimate issue," *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993), was based upon the District Court's thorough analysis and evaluation of the evidence. Significantly, while not mentioned in the Petition, the District Court itemized evidence showing at least eight verbal or written requests to petitioner, spanning from August 28, 1984 to July 22, 1985, for a meeting. (A 38-44, Findings 37-41, 47-50.) The District Court further found facts supporting a concern that privileged information had been revealed, A 40-42, Findings 42-45, and that the stated rationale for the meeting was both legitimate and consistent. (A 74-76.) Finally, after listening to Star-Kist's key decisionmaker with respect to the termination, the District Court made a credibility finding in favor of Star-Kist. (A 78, 87.)

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[2] As used herein, "A" shall refer to the Appendix contained in the Petition for Writ of Certiorari.

The District Court's factual findings were properly affirmed by the Court of Appeals under the clearly erroneous standard. Fed. R. Civ. P. 52(a) provides, in pertinent part:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

It is well established that a finding is clearly erroneous only when the reviewing court is left with the definite and firm conviction that a mistake has been made, and the standard does not entitle a reviewing court to reverse simply because it is convinced it would have decided the facts differently. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1984). Of course, the clearly erroneous standard is applicable to factual findings in Title VII cases. *Anderson, supra; Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Petitioner has not, and indeed cannot, persuasively argue that the record permits a reversal under the clearly erroneous standard. Thus, given the finding that petitioner's termination was non-retaliatory and independent of protected activity, it is clear that the instant case does not present the issue petitioner purports to frame for review.

In addition to ignoring the factual findings of the District Court, petitioner has also predicated his argument upon an erroneous characterization of the test to prove causation in a retaliation case. Specifically, although petitioner has utilized the "but for" language found in the case law, he utilizes it in a fashion that is both superficial and erroneous. Indeed, petitioner essentially advocates a rule that would deprive trial courts

from actually determining causation-in-fact in favor of a rule that would automatically entitle a retaliation plaintiff to summary judgment in his or her favor on the most attenuated of circumstances. In the instant case, petitioner argues that "but for" his protected activity, Star-Kist's attorney would not have requested a meeting and petitioner would not have been terminated for failure to attend a meeting. If the "but for" test is as petitioner describes, there would have been no need for a trial.

However, while some cases use the term "but for" interchangeably with causation-in-fact, *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1572 (5th Cir. 1989) (cited by petitioner), causation-in-fact requires an inquiry as to whether the stated reason for terminating an employee is independent of the employee's exercise of protected rights. *Benson v. Little Rock Hilton Inn*, 742 F.2d 414, 418 (8th Cir. 1984); *Womack v. Munson*, 619 F.2d 1292, 1297 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981). Indeed, petitioner ignores substantial case law that would have been decided differently if petitioner's "but for" test were the rule. *See, e.g., Benson, supra; Jackson v. St. Joseph State Hospital*, 840 F.2d 1387 (8th Cir. 1988), *cert. denied*, 488 U.S. 892 (1988); *Davis v. Lambert of Arkansas, Inc.*, 781 F.2d 658 (8th Cir. 1986). Clearly, it is only through a misapplication of the test for causation that petitioner can suggest that the decision of the Court of Appeals in the instant case diminishes the right to engage in protected activity. However, the Court of Appeals properly affirmed findings of the District Court that the termination was factually independent of protected activity. Thus, there is no significant issue worthy of further review.

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER RETALIATORY ANIMUS OF AN OUTSIDE TRIAL ATTORNEY CAN BE IMPUTED TO THE ATTORNEY'S CLIENT.

In framing his second issue, petitioner has once again substituted his argumentative inferences for the District Court's factual findings. Specifically, petitioner suggests that the instant case raises the question of whether the retaliatory animus of an outside trial attorney should be imputed to the attorney's client. However, the District Court rejected petitioner's suggested inference that outside trial counsel was guilty of retaliatory animus and specifically found to the contrary. Since petitioner does not and cannot persuasively argue that the District Court's findings are clearly erroneous, the issue petitioner has attempted to raise is without foundation. In other words, to borrow from petitioner's analogy, Star-Kist's manager who made the termination decision could not have been the "cat's paw" if Star-Kist's outside trial counsel was not proven to be the cat.

Dispositive is the District Court's finding that " . . . there is no evidence that [the attorney] deliberately misled [the Star-Kist decisionmaker] because [the attorney] wanted Maness to be terminated because of his deposition testimony." (A 90-91.) The District Court had the opportunity to evaluate the attorney's testimony and also had before it all correspondence authored by the attorney. In that regard, Star-Kist waived its attorney-client privilege as to all communications bearing upon the termination of petitioner. Based upon all of the evidence, the District Court made related findings that the

attorney's stated rationale for the meeting was both legitimate and consistent. (A 74-76.) The legitimacy of the attorney's concern that privileged information had been revealed was based upon statements made by opposing counsel in the Ellenberg case, some of which were made in court and transcribed, as well as petitioner's deposition testimony in the Ellenberg case and subsequent rulings thereon. (A 41-42, Findings 44-45.) Thus, in light of the District Court's findings, which petitioner does not and cannot challenge as being clearly erroneous, the question of whether retaliatory animus of an outside trial attorney can be imputed to the attorney's client is not presented on the record of the instant case.

CONCLUSION

In light of the foregoing, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Dated: May 19, 1994.

Respectfully submitted,

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